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SOL (MSHA) v. HOMESTAKE MINING

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. CENT 83-15-M
A.C. No. 39-00055-05503

v.

Homestake Mine

HOMESTAKE MINING COMPANY,
RESPONDENT

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead,
South Dakota,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

The issues are whether respondent violated the regulation; if so, what penalty is appropriate.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. The proposed penalty based upon the assessment, would not have detrimental effect on the company's operation. In addition, the citation that is in issue here was properly delivered to the company during the course of an inspection.

Citation 2097733

This citation alleges respondent violated 30 C.F.R. 57.14-55, which provides:

Welding operations shall be shielded and well-ventilated.

Summary of the Evidence

MSHA Inspector Iver Iverson issued this citation when he observed that a welding shield was not being used during welding operations at the 8,000 foot level (Tr. 16-19, 24; Exhibit P1, P2, P3).

A welder and his helper were welding rebar at the pump station. A welding shield can be a canvas curtain placed on a small framework. Such a shield is positioned so other persons in the area will not be exposed to the direct rays of the welding arc of the electrode (Tr. 24).

At the time of the issuance of this citation the welder himself was wearing a welder's hood and the helper was wearing safety glasses (Tr. 28, 29).

The inspector agreed that the welder's helper was probably trained not to look at the arc when the welding is being done. The inspector issued the citation because Homestake failed to provide a shield between the helper and the welder (Tr. 32, 33, 46).

In this particular work situation the helper would pickup the rebar, walk to the wall, and hold it in place while the welder struck an arc and welded the rebar. It takes about 30 seconds to tack the rebar (Tr. 38, 64, 65). The inspector considered this to be a poor working procedure because the helper was exposed to arc and slag burn (Tr. 39).

Homestake abated this citation by installing a canvas curtain which was moved as the work progressed (Tr. 43, 44).

Witness Jim Mattson, Homestake's general shop foreman, indicated that it is standard procedure for the helper to position materials to be welded, particularly, if they are heavy (Tr. 46, 48). In this situation the welder would instruct his helper where he'd like the rebar held. He also lets the helper know when he is prepared to strike an arc. The helper can then turn away. He is trained and thereby shields his eyes from the welding arc (Tr. 50, 52).

Inside Homestake's welding shop shields are used to protect the 20 to 30 workers in the area (Tr. 55).

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Witness Mattson differs with the inspector's opinion over whether a hazard exists from illumination when the helper has turned and walks away from the welding arc (Tr. 62, 63).

Mine superintendent Jerry Pontius testified that it was not practical to have a shield between the welder and his helper. Any shield would prevent the helper from observing if he was holding the rebar correctly (Tr. 68-71).

Illumination and reflected rays are not a problem because any hazard to the eyes occurs only when detrimental rays go directly from the arc to the retina of the eye. A similar arc is used in movie theatres to project images onto the screen. Persons watching movies are not injured by the reflected rays (Tr. 72).

Pontius has never had an occurrence when a welder's helper was blinded by the rays of a welding arc. However, a condition known as "sandy eyes" can occur if a welder or his helper is "flashed" by the arc (Tr. 74, 77, 79, 83, 86). Such a condition occurs if the welder begins welding before pulling down his hood (Tr. 79). In this particular work situation clamps could have been used to hold the material in place (Tr. 103).

The use of a welding shield, such as in the shop, is a well established procedure to shield workers in close proximity to the welding arc (Tr. 82).

Discussion

The basic facts are essentially uncontroverted. They establish that respondent failed to shield its welding operations in the 8,000 foot level of its mine.

Respondent's post-trial brief asserts that there is no definition in 30 C.F.R. 50.2 as to what constitutes a shield and the regulation itself does not specifically require an operator to shield a worker from the area where the worker is performing his job. Therefore, it is argued that no violation occurred.

Respondent's arguments lack merit. Homestake's witness indicated that shielding from a welding operation is a well known procedure (Tr. 82).

Respondent also contends that upholding this citation would require it to comply with a requirement which is not set forth in the regulation. Therefore, such a construction would violate the requirement that fair warning be given of what is required for compliance citing National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 704 (3rd Cir.1979) and McCormick Sand Corp., 2 FMSHRC 21 (1980).

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I disagree. The standard merely requires that the welding operation be shielded. The operator can choose the method of abatement. In this particular situation the rebar could have been attached with clamps, thereby eliminating the need for the helper to be in close proximity to the welding procedure. National Industrial Sand Assoc. v. Marshall is not inopposite this view.

McCormick Sand Corp. involved an electrical regulation, 30 C.F.R. 56.12-25. In that case Commission Judge Franklin P. Michels refused to support MSHA's view that the "ground" had to be continuous. He noted that McCormick Sand had provided a ground. It followed that the Secretary could not, without more, require a particular type of ground. Simply stated, McCormick Sand Corp. does not factually support Homestake's argument. There is no evidence here that this welding operation was shielded in any manner.

Homestake further argues that compliance with the regulation, as interpreted by the inspector, would in essence reduce miner safety citing Sewell Coal Company, 5 FMSHRC 2026 (1983) and National Independent Coal Operations Association v. Norton, 494 F.2d 987 (D.C.Cir., 1974), Aff'd, 423 U.S. 388 (1975).

The cited cases do not support Homestake's argument. Sewell Coal Company establishes the principal that an operator may argue diminution of safety as a defense to the Secretary's allegation of a violation and request for imposition of a penalty under the following circumstances: (1) the operator petitioned for the modification of a standard and was subsequently cited for violating the standard; (2) the Secretary granted the modification but nonetheless continued the enforcement proceedings; and (3) the material circumstances encompassing the modification and the enforcement proceedings are identical, 5 FMSHRC at 2030. It is apparent that the defense of diminution of safety is not available to respondent here since there is no evidence that the respondent ever sought a modification of 57.14-55.

National Independent Coal Operators Association is not controlling as it involves an overview of the Act as it relates to the imposition of penalties.

Homestake has failed to present a defense to the Secretary's evidence. Accordingly, this citation should be affirmed.

Civil Penalty

The statutory criteria for assessing a civil penalty are contained in 30 U.S.C. 820(i) of the Act.

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Citation 2097733 is to be affirmed. The proposed penalty of \$20 appears to be in order, particularly in view of the stipulation of the parties.

Briefs

The Counsel for both parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Citation 2097733 and the proposed penalty should be affirmed.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

Citation 2097733 and the proposed penalty of \$20 are affirmed.

John J. Morris
Administrative Law Judge